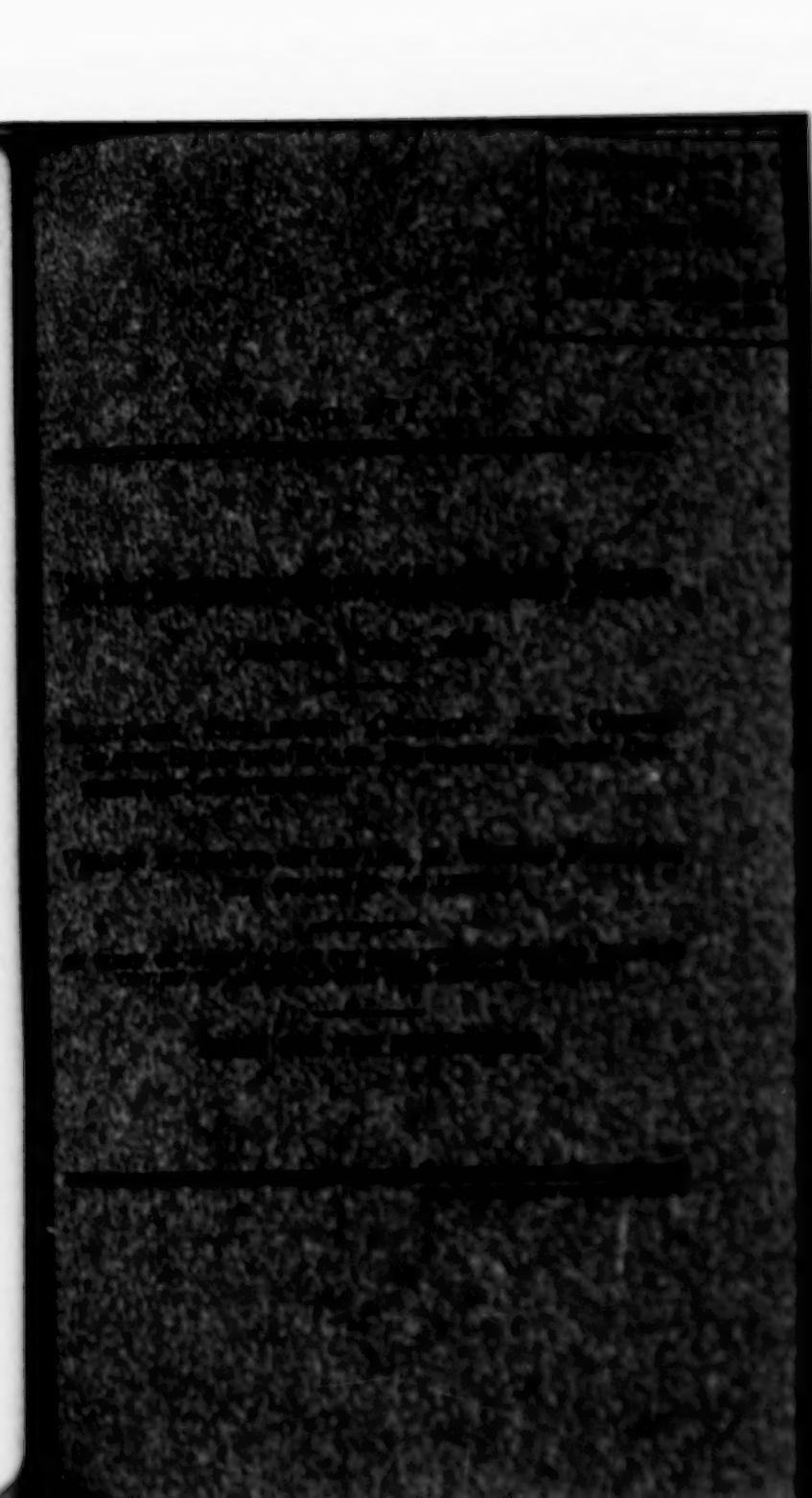

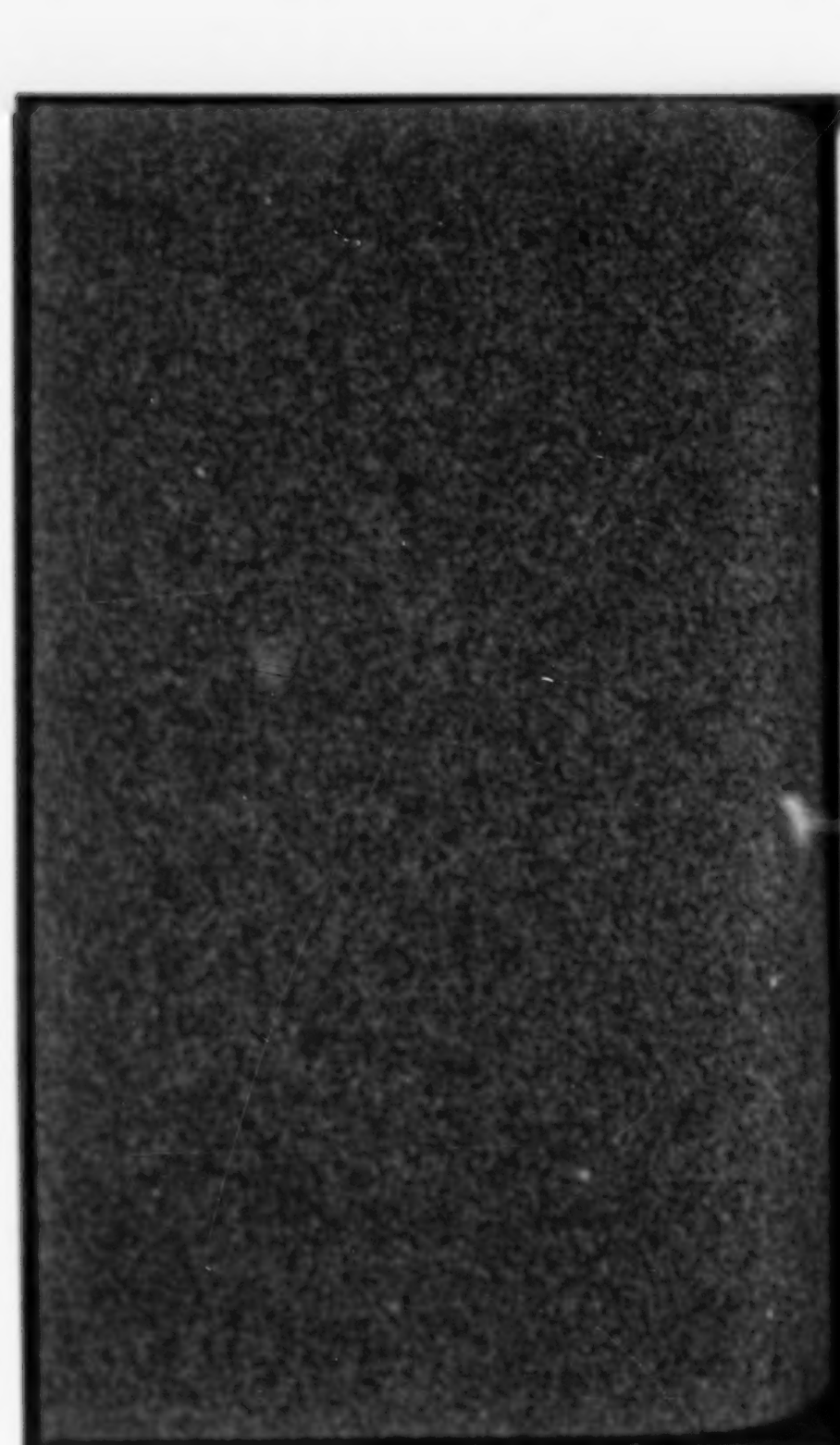

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 271

BALTIMORE STEAMSHIP COMPANY AND UNITED States Shipping Board Emergency Fleet Corporation, petitioners

v.

VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS, his guardian ad litem

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION

The opinion of the Circuit Court of Appeals (R. 117) is reported in 9 F. (2d) 902. The opinions of the District Court are not reported, but appear on pages 27 and 35 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 16, 1925. (R. 122.) The petition for certiorari was filed on January 20, 1926, and granted on March 8, 1926. (R. 122.)

THE QUESTION

This case presents the single question of whether a final judgment in admiralty in a proceeding in which the libelant claimed damages for personal injuries, or in the alternative claimed maintenance and cure, is a bar to a subsequent suit at law for the same injuries, based on a theory of liability which either was or could have been urged in the admiralty suit.

STATEMENT

This petition involves a situation where an injured seaman instead of applying for and receiving compensation under the Federal Employees' Compensation Act of September 7, 1916 (c. 458, 39 Stat. 742), to which he was entitled (34 Op. Atty. Gen. 363), brought suit to recover for personal injury. After judgment against him, from which no appeal was taken, he brought a second suit to recover for the same injury. The courts below refused to sustain a plea of *res judicata,* the Circuit Court of Appeals deciding that the different allegations of fault in the two suits set forth two different causes of action for the same injury.

On July 24, 1921, Vernon Phillips (Philipps), a seaman on board the steamship *West Cape,* was working in hold No. 1 of the vessel. While dunnage was being removed from the hold, a strongback (or beam) fell from the hatch and struck Phillips' left ankle, fracturing it.

The statute which governs the right of Phillips to recover indemnity for his injury is Section 20 of the Act of March 4, 1915 (c. 153, 38 Stat. 1164, 1185) as amended by Section 33 of the Act of June 5, 1920 (c. 250, 41 Stat. 988, 1007) which reads as follows:

> SECTION 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *.

This Court considered and explained the statute in *Panama Railroad Co.* v. *Johnson* (264 U. S. 375).

Phillips filed a libel in admiralty in the United States District Court for the District of Maryland, against the United States of America, the United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company. (R. 101.) He set forth his injury, alleging (R. 101)—

> that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel,

and claimed $15,000 indemnity. By amendment he alleged (R. 103)—

> that the negligence claimed consists in the failure of the respondent, the United States of America, to provide a cleat or socket of the proper design and sufficient strength to support the strong back when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold, further the officers of the steamship *West Cape* were incompetent, further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libelant claims, in the event that negligence is not established, for wages, maintenance and cure.

Phillips testified at the trial of that case. (R. 58, et seq.) Judge Rose filed an opinion (286 Fed. 631) finding that libelant's ankle had been fractured and ultimately his left leg had been amputated above the knee; that there was nothing whatever the matter with the construction or design of the cleat or socket which held the strongback; that the injury was caused by the negligent way in which the dunnage was taken out of the hold; but that the record did not show lack of due care in selecting competent officers. He concluded his opinion by saying (p. 633):

> In this case, one cannot help regretting that under the authorities it is not possible to hold somebody for the needless and irreparable injury done this youth.

> As the decisions stand, however, all that may be awarded him is the cost of his maintenance and cure, which upon the testimony the parties agree amounts to $500.

A decree was entered on February 19, 1923, reciting (R. 100):

> This cause having come on for hearing, on the pleadings and proofs, and having been argued and submitted, due consideration having been had, it is now this 19th day of February, 1923,
>
> Ordered, adjudged and decreed, by the District Court of the United States for the District of Maryland, that the respondents are not liable to the libelant for full indemnity, but only for maintenance and cure, which is hereby fixed at five hundred dollars, and which the respondents are to pay to the libelant * * *.

No appeal was taken from this decree and it was marked "satisfied" on March 21, 1923. (R. 106.)

On May 22, 1923, before the expiration of the time during which an appeal might have been taken from the Maryland decree, Phillips started an action at law in the Supreme Court of the State of New York against the petitioners, the Baltimore Steamship Company and the United States Shipping Board Emergency Fleet Corporation, who were two of the respondents in the admiralty suit. The third respondent, the United States of America, was not joined. (R. 2.) In his complaint

Phillips alleged, among other things (R. 3, Article 12):

> That the injuries to the plaintiff were directly caused by the negligence of the defendants and of the officers and their seamen in their employ in their negligent and reckless control and operation of said vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence, and safety of the plaintiff, and in their failure to give warning to the plaintiff of the impending danger.

Indemnity was claimed in the sum of $100,000. (R. 4.) This case was removed to the District Court of the United States for the Eastern District of New York. (R. 5, 6.) Answers were filed by the petitioners setting up, among other defenses, that of *res judicata* based upon the decree in the Maryland suit. (R. 8, 11.)

Upon the stipulation of counsel the plea of *res judicata* was argued before trial. On January 15, 1924, Judge Inch handed down a decision holding that the Maryland decree was a bar. (R. 27.) This he reversed on rehearing by an opinion dated May 15, 1924. (R. 35.) The case was then tried upon substantially the same proofs as were before Judge Rose in Maryland. The record in the Maryland suit was offered in evidence by the petitioners and rejected. Exceptions were duly taken. (R. 82 et seq.) The case was allowed to go to the jury, which returned a verdict for the plaintiff against

the petitioners in the sum of $40,000. The case was then taken to the Circuit Court of Appeals upon writ of error and that court affirmed the decision of the District Court. The Court of Appeals held that a cause of action for injuries due to unseaworthy gear was different and distinct from a cause of action for the same injuries due to the negligent use of seaworthy gear.

OPINIONS OF THE LOWER COURTS

In his first opinion Judge Inch held (R. 28):

> It is plain from a reading of the papers both in the admiralty action and in this present action that the same facts were relied upon to show liability to plaintiff on the part of these defendants. The cause of action in both actions is to recover for personal injuries due to neglect of duty by defendants. The word "indemnity" has no significance so far as the point now under consideration is concerned.
>
> * * * * *
>
> If he sued in admiralty he would not be entitled to recover an indemnity for the negligence of the master or any other member of the crew and all the members of the crew exclusive possibly of the master were between themselves fellow servants.
>
> This would not of course have affected his right to recover, as he did for maintenance and cure.
>
> The same rule as to fellow servants would have existed in his common law action.

The second opinion of May 15, 1924, was written after this Court held in *Panama R. R. Co.* v. *Johnson* (264 U. S. 375) that Section 33 of the Merchant Marine Act of 1920 had modified the maritime law and that the rights given by that law as modified could be enforced either in courts of admiralty or in courts of common law. Judge Inch felt that Judge Rose had committed error in his opinion, and apparently for that reason held the Maryland decree was not a bar, saying (R. 38, 39):

> While, therefore, the order complained of is right if plaintiff had been allowed to litigate in his admiralty action this question of negligence such decree is a bar only as to such issues as were litigated or which plaintiff could have litigated.
>
> * * * * *
>
> From now on there can be no danger of two suits, one in admiralty for maintenance and cure, unseaworthiness of the ship, etc., and one at law for negligence on the part of the master and crew, for henceforth the trial court in admiralty can award the proper damages and amount, or at law submit same to a jury.

In discussing this question Judge Learned Hand, speaking for the Circuit Court of Appeals, said (R. 120):

> In the case of a suit for personal injuries, it is indeed possible to regard the action as based alone upon the plaintiff's bodily injury. So viewed, a battery would be the

same cause of action as an action on the case for unintentional injury. The question would be irrelevant whether the injury, in fact caused by the defendant, was intentional or careless. The material fact would be the injury itself and its causation by the defendant. History alone forbids such a view, though eventually the law may assume that form, 8 Harv. Law Review, 1.

Nevertheless, among actions on the case it would still be possible to adopt the theory, somewhat mutilated to be sure, but consistent so far as it went. Confined to acts which were unintentional, the law might regard the injury and its causation as alone constituting the cause of action, treating as a variant, immaterial in the definition of the species, the kind of neglect which cut off the defendant's excuse that the injury was not intended. So viewed, it would be the same cause of action whether the defendant had installed unseaworthy gear, or had been careless in the use of seaworthy gear.

But a defendant's liability in such cases might depend upon a quite opposite notion; that is, that he owed a duty of care in the use of such gear as he installed and another duty to install seaworthy gear. In that view the cause of action would differ according as the plaintiff charged him with one or the other default, and a judgment on the one would not be a bar to the other. We concede that the law has not come to a definite conclusion between the two theories, and cases may be

found taking either view, but obviously we are to be controlled by that taken by the Supreme Court so far as it has declared itself.

The nearest case is *Troxell* v. *D. L. & W. R. R. Co.*, 227 U. S. 434, which, we think, favors the plaintiff. Troxell's widow had sued the defendant alleging that it had failed to provide proper safety appliances under the Pennsylvania statute. She lost, and brought a second action based on the Employers' Liability Act for the negligence of the defendant's servants in handling its cars. The first judgment was held not to be a bar. The case may, it is true, be distinguished on the ground taken by Mr. Justice Lurton, that the parties were not the same, because in the second suit, the widow sued as administratrix. Yet the decision goes much further, because the court clearly held that it was one cause of action not to furnish safe cars and another to use safe cars carelessly.

It is not perfectly certain that, had the plaintiff in the first action relied upon the Employers' Liability Act, as she might (because that includes defective appliances), the result would have been the same. That is indeed the case at bar, since the Jones Act incorporates the Employers' Liability Act. But if we ignore the difficulty arising from the distinction in the plaintiff's persona, it appears to us that there could be no logical differences. If the "cause of action," as the

defendants at bar must maintain, consists of the injury and its origin from the defendant in one way or another, it can not be a distinction that in Troxwell's case the defendant's faults were defined in two statutes, while in the case at bar they are to be found in one. The crux of the question rests not in the sources of the faults, but whether the law regards them as constitutive or only regulative of the basis of recovery. No doubt that in the end is a conventional question, but then so is most of the law. Perhaps it would be practically better to insist that a person injured by another should bring forward at one time all the reasons why he should recover. Yet there is a clear difference between injuring an employee because of inattention in the conduct of one's work and because of failing to furnish proper tools. The difference appears to us at least, as substantial as between injuring him intentionally and unintentionally. It does not follow because such diverse situations may be divided, that a plaintiff may sever by separate suits different acts of negligence in the conduct of the work. It is enough for the present that the Supreme Court has countenanced the severance how necessary.

The exclusion of the roll in the admiralty suit was proper after what we have said. No fact actually adjudicated in the suit was material to the disposition of the action. As an estoppel it was irrelevant; as a bar it was bad.

SPECIFICATION OF ERROR TO BE URGED

The courts below erred in failing to sustain the plea of res judicata.

SUMMARY OF THE ARGUMENT

Whatever rights Phillips had growing out of his injury were given to him by the general maritime law as amended by statute. These rights could have been enforced either in an admiralty or common law suit. In either case his substantive rights would have been the same. In the suit in the U. S. District Court in Maryland negligence in the operation of seaworthy gear could have been urged—if it was not—just as well as in this case. That court decided as a matter of substantive law that such negligence did not give rise to a cause of action. If this was erroneous, it should have been corrected on appeal and not by collateral attack.

The gist of the action was the wrongful dropping of the stowhook on Phillips' ankle. There was only one cause of action no matter how many negligent acts or omissions to perform duties make the dropping wrongful. If the wrongful dropping caused both by improper gear and its negligent operation give rise to two causes of action, there is no reason why there should not be as many causes of action as there are acts of negligence. Such a rule would tend to multiply the number of suits arising from a single injury.

The rule of this Court as laid down in *Stark* v. *Shaw* (94 U. S. 477, 485) and other cases is that

a plaintiff may not try his case piecemeal but must present in one suit all the grounds of liability on which he expects to recover. The Maryland decree is therefore a bar to the cause of action arising out of injuries inflicted by the wrongful dropping of the strongback. It is an adjudication of all the theories of liability which were or could have been urged in that suit.

ARGUMENT

THE MARYLAND ADMIRALTY DECREE WAS AN ADJUDICATION OF ALL PHILLIPS' RIGHTS GROWING OUT OF THE INJURY AND IS A BAR TO THE NEW YORK SUITS

I

IN THE MARYLAND SUIT THE ISSUE OF NEGLIGENCE IN THE OPERATION OF THE WINCH WAS OPEN TO PHILLIPS AS A GROUND OF RECOVERY

Phillips' injury occurred on board the *West Cape* while that vessel was on the high seas. Whatever rights he had were given him by the maritime law. That law determined his substantive rights whether he sought relief in admiralty or at law. (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.)

The rule under the general maritime law (*The Osceola*, 189 U. S. 158, 175) was:

> That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

This rule of the general maritime law was changed prior to the occurrence involved in this case by Section 33 of the Merchant Marine Act of 1920 (41 Stat. 1007). Since the passage of that Act a seaman has been entitled to an indemnity for injuries caused by negligence of fellow servants. (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557.)

The rule is now the same no matter what the forum. This Court said in *Engel* v. *Davenport* (271 U. S. 33, 37):

> It is clear that the state courts have jurisdiction concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law.

The same theory of liability could have been urged in the Maryland suit that was urged in this suit. The Circuit Court of Appeals did not say that the District Court of Maryland could not have granted relief for negligence in the operation of a proper winch, but did hold, as it construed the pleadings, that such negligence had not been alleged. Judge Rose based his decision not on the narrow ground that negligence in the operation of the winch had not been alleged, but on his understanding of the substantive maritime law. His concluding words (286 Fed. 631, 633) indicate that if he had been merely prevented from giving relief because the negligence in the operation of the winch was not alleged he would have allowed an amendment.

II

PHILLIPS HAD ONLY ONE CAUSE OF ACTION AGAINST THE PETITIONERS FOR INJURIES SUFFERED FROM THE WRONGFUL DROPPING OF THE STRONGBACK UPON HIS ANKLE

The gist of the cause of action was the wrongful dropping of the strongback. There may be a number of reasons why the dropping was wrongful. There may have been negligence of the master, negligence of the mate, negligence of the boatswain, or of other officers or of members of the crew. There may have been a defective winch, a defective rope, or other defective tackle. All these go to establish the ultimate proposition that the dropping was wrongful and that the wrongful dropping injured the plaintiff. If he were given a cause of action for each act of negligence which contributed to make the dropping wrongful or for each omission of a duty to furnish proper gear which made the dropping wrongful, there would be no end of litigation arising out of a single injury. It may be urged that the Circuit Court of Appeals did not go that far, but merely says there were two groups of causes which contributed to make the dropping wrongful, each of which would create a cause of action; that is, one for failure to provide seaworthy gear and another for the negligent operation of proper gear. But even a division into two classes would unduly prolong litigation and produce multiplicity of suits.

This Court in *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel* (270 U. S. 611) stated broadly the exact rule to be applied in a case of this character (though the precise question here presented was not decided), saying, at p. 617:

> Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident.

In *Columb* v. *Webster Manufacturing Co.* (C. C. A. 1st), 84 Fed. 592, the plaintiff had brought an action against his employer in a State court to recover for injuries suffered because he was thrown into the river by the sudden giving away of a trestle, which he alleged was not a safe place to work because carelessly and negligently constructed. After judgment for the defendant, he brought a second action in the Federal court alleging that the trestle fell and "owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the perform-

ance of said work, the plaintiff was precipitated into the said river," and was injured.

Thus the first ground was failure to provide a safe place to work. The second ground was negligence of fellow servants known to the defendant employer to be incompetent. Mere incompetency, without negligent acts causing damage, would be *injuria absque damno*. "My Lords, the *Paludina* is not liable for mere negligence, but only for negligence causing damage." (*The Paludina*, H. L., 1926, 25 Ll. L. R. 281, 285.) If the opinion of Judge Hand is correct, these were two different causes of action. Yet the Circuit Court of Appeals for the First Circuit, in a clear and well-reasoned opinion which has been cited many times with approval, held that the first suit to recover for the injury was *res judicata* of all grounds of recovery.

In *Miller* v. *Spokane International Ry. Co.* (C. C. A. 9th), 293 Fed. 748, both suits considered therein were brought under the same two statutes, the Locomotive Boiler Inspection Act and the Federal Employers' Liability Act. (The latter of these is incorporated by Section 33 of the Merchant Marine Act, which is in question in the instant case.)

In the first suit the plaintiff alleged a violation of one rule in that the cab apron was not roughened and did not fit smoothly. In the second he alleged a violation of a different rule, in that the apron was too short, and claimed that these were separate torts. (293 Fed. 749.) The court held that judg-

ment in the first suit was *res judicata* of all grounds for recovery for the injury, saying, at page 750:

> It is the personal injury that is the gist of the action, and although negligence alleged may have been caused by the omission to comply with one of several specific requirements which it was the duty of the carrier to do, nevertheless plaintiff had but one cause of action, and having selected one defect of several upon which he might have based his action, he can not now bring another suit based upon another specific defect. In *Stark* v. *Starr,* 94 U. S. 477, 24 L. Ed. 276, the court said: "It is undoubtedly a settled principle that a party seeking to enforce a claim legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." We can not find any solid ground upon which to except the present action from the principle stated. *Jenkins* v. *Atlantic Coast Line R. Co.* (C. C.), 179 Fed. 535; *Clare* v. *New York & N. E. R. Co.,* 172 Mass. 211, 51 N. E. 1083.

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under the statute, on the principle of *respondeat superior,* failure on the part of a fellow servant to use due care toward the injured man, is equally with defective appliances, an "omission to comply with one of several specific requirements which it was the duty of the carrier to do."

Thus the holding of the Circuit Court of Appeals for the Ninth Circuit in the *Miller case*—that the

plaintiff must allege in his suit for personal injury all of the various omissions to comply with the requirements of the statute of which he complains, and that separate omissions do not constitute separate torts—is a square holding that under the same statute which has been incorporated in the Merchant Marine Act failure to supply proper equipment and negligent operation of the equipment are both merely wrongful acts which create, together with the injury, the cause of action, but which create only one cause of action for the same injury.

A large number of cases decided in the State courts likewise illustrate the same principle, namely, that a cause of action arises from the existence of a primary right in one person and a violation of that right by some delict on the part of another. Phillips had a primary right to bodily integrity. The delict was dropping the strongback on his ankle. Whatever was wrongful, be it negligence of the officers or anything else, made the dropping a delict. But the right plus its violation by the wrongful dropping, and not the cause of the dropping, is the cause of action.

In *Pavelka* v. *St. Albert Society* (82 Conn. 146) the plaintiff brought successive suits claiming wrongful expulsion from a society. In the two suits different grounds of alleged wrongfulness were set up. The court held that the first suit made the matter *res judicata,* saying (p. 147):

> A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. * * * The wrong complained of in both actions was the act of wrongful expulsion, and it was the same act in both cases. * * * Its wrongfulness might result from a sufficient single cause, or from a concurrence of causes each sufficient in itself. However this might be, the essential thing necessary to perfect a right of action would be the wrongful character of the act of expulsion. The conditions creating that character would be only incidental facts evidential of the principal fact upon which alone the plaintiff could rely, and upon which in both cases he did rely.

Beauregard v. *Webb Granite Co.* (160 Mass. 201), was a suit under an employers' liability statute. Clause 1 of Section 1 of the statute made the employer liable for injuries from defects in machinery; clause 2 made the employer liable for negligence of the superintendent. The declaration was in two counts, alleging liability under both clauses. The plaintiff was compelled to elect between the counts by the trial court, which the Supreme Judicial Court held to be error, saying (p. 202):

> There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages for the death of Clement Beauregard.

In *Emerson* v. *Street Railway* (116 Maine, 61), the court held (p. 67):

> In the case at bar we have a clear instance of "res judicata." The essence of the charges in both writs is that the defendant negligently and carelessly discharged its ultimate duty to the plaintiff, which was to afford her safe egress to the street. Negligently starting the car as she was alighting, and negligently allowing her to step from the car into an open trench, dug by the defendant and by it allowed to remain open, unguarded, and unlighted, are both violations of one and the same duty. Defendant was guilty of but one tort, and there was but one cause of action, and there having been a judgment on the merits in the prior action, it is a bar, not only to the issues that were tried, but also as to all that might have been tried.

In *McKnight* v. *Minneapolis St. Ry. Co.* (127 Minn. 207) the court said:

> In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. In the instant case plaintiff was a passenger upon defendant's street car, and it was the duty of defendant to afford her safe egress therefrom. Her claim for damages is grounded upon the charge that defendant violated such duty. The violation of this duty constitutes her cause of action. In the first suit she charged that defendant

> violated this duty by suddenly starting the car while she was in the act of alighting. In the present suit she charges that defendant violated such duty by providing a defective step for her to use in descending from the car. Both suits are based upon the violation of the ultimate duty to afford safe egress from the car. The second suit "presents no new cause of action, but only new grounds for relief upon the same cause of action," and under the authorities cited is barred by the judgment in the former suit.

In *Payne* v. *New York, S. & W. R. Co.* (201 N. Y. 436, at 441) the court said:

> [The complaint] sets forth facts which render the defendant liable at common law; it contains other allegations which tend to support a claim under the Employers' Liability Act which is pleaded; and it pleads still other averments which bring the case within the rule of the Federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability.

The Circuit Court of Appeals based its decision on *Troxell* v. *Del., L. & W. R. R. Co.* (227 U. S. 434). That case involved a second suit for the same death. In the first Troxell suit recovery was sought under the Pennsylvania Wrongful Death Statute of April 15, 1851 (P. L. 674). It was urged in the District

Court (180 Fed. 871) that the Federal Employers' Liability Act was exclusive, but the court held that the State Act could still apply at least to injuries received by men engaged in intrastate commerce. The Circuit Court of Appeals reversed (183 Fed. 373) for the reason that the facts proved did not constitute a cause of action under the Pennsylvania statute, and said that it was unnecessary to decide the other points raised.

The second suit was based on the Federal Employers' Liability Act and recovery was allowed by this Court. Only one cause of action arose out of Troxell's death. If he had been engaged in intrastate commerce the State Act would apply. If he had been engaged in interstate commerce the Federal Act would apply. Whether he was engaged in intrastate or interstate commerce was not decided in the first suit. It was necessarily decided in the second suit that he was engaged in interstate commerce, otherwise no recovery could have been allowed under the Federal statute. In the first suit the plaintiff pursued a nonexisting cause of action. This did not bar her from later pursuing the existing cause of action. The Court said (p. 442):

> If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law and pursued the supposed

> remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled.

Chicago, Rock Island & Pacific R. R. Co. v. Schendel (270 U. S. 611) presented a parallel situation. There it was held that if Hope (the deceased) had been engaged in interstate commerce he had a cause of action under the State law; if engaged in interstate commerce, a cause of action under the Federal statute. The Court said (p. 626):

> It is urged in behalf of respondent, that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in interstate commerce, the state law is supreme.

And at p. 627:

> Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident.

Here Phillips' injury gave rise to a single cause of action determined by the maritime law as modified by the Federal Employers' Liability Act, which was incorporated into the maritime law by Section 33 of the Merchant Marine Act of 1920. The suit in the District Court for the District of Maryland was brought on this cause of action.

If the suit for injury from negligence is on a different cause of action from a suit for the same injury from unseaworthiness then plaintiff would be entitled not only to two suits, but to two recoveries.

A recovery on one cause of action is not a bar to recovery by the same plaintiff against the same defendant on any other causes of action which he may have. It follows that if Mr. Phillips had two causes of action against the petitioners, one for the injury caused by unseaworthiness, and the second for the same injury caused by negligence, then he was legally entitled, first to sue the petitioners for his injury and prove unseaworthiness and recover, and to sue the petitioners a second time for the same injury and prove negligence, and also recover a second time. This consideration alone is a sufficient reason for holding that there was only one cause of action and that the wrongful acts were merely the delict upon which recovery might be based. This consideration is presented in *Columb* v. *Webster Manufacturing Co.* (84 Fed. 592, at page 595):

Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in

favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

III

A JUDGMENT IN ONE SUIT IS A BAR TO ANOTHER SUIT ON THE SAME CAUSE OF ACTION IN FAVOR OF THE SAME PLAINTIFF AGAINST THE SAME DEFENDANTS, ALTHOUGH A NEW REASON FOR LIABILITY IS URGED

In *Stark* v. *Starr* (94 U. S. 477, 485) the Court said:

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such practice were permissible.

And in *United States* v. *California & Oregon Land Co.* (192 U. S. 355, 358):

> The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of for-

feiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. *Phosphate Sewage Co.* v. *Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. *S. C.* 4 Apps. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim, *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed. Secs. 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery.

CONCLUSION

It is submitted that Phillips had only one cause of action, that this was given to him by the general maritime law as modified by statute, that in the Maryland suit this cause of action was before the court and every reason supporting liability which was urged in the lower courts in this case could have been urged there, and that this suit is on the

same cause of action, and that it is barred by the Maryland decree, and that for these reasons judgment should be reversed.

Respectfully submitted.

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